IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 30

GERALD D. NELSON, GERALDINE D. N. ACKER and GERTRUDE N. FITZPATRICK, as Successor Trustees under the Will of William Nelson, Deceased, and HELEN D. MOLLER,

Appellants,

vs.

THE CITY OF NEW YORK,

Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

REPLY BRIEF FOR APPELLANTS

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ARGUMENT

A

New York City's *in rem* foreclosure statute directs confiscation of the entire property to enforce the tax lien. The confiscation suffered by appellants violated rights protected by the Fourteenth Amendment.

(1) The validity of an *in rem* foreclosure statute for collecting delinquent real estate taxes similar to Title D, Chapter 17, of the New York City Administrative Code appears unsupported by any decision of this Court.

Common characteristics of the *in rem* method of enforcing real estate tax liens are notice by publica-

tion and a judgment against the property itself which is satisfied by a sale of the property with the surplus proceeds accruing for the benefit of the owner.

The striking irregularity of the City's Statute is that it directs a confiscation of the whole property in lieu of a sale wherein only the amount of the tax due is retained by the tax authority.

It is this feature which, Appellants believe, presents a novel question to this Court.

Certainly *Winona & St. Peter Land Co.* v. *Minnesota,* 159 U. S. 526; *Longyear* v. *Toolan,* 209 U. S. 414 and *Leigh* v. *Green,* 193 U. S. 79, cited by Appellee, are no support for the confiscatory aspect of Title D, nor of the City's action thereunder in taking appellants' two properties.

The *Winona* case, *supra,* was determined under the provisions of Minnesota General Statutes, 1878, Chap. 11, Par. 70-121. That statute specifically directed a sale of the property with the surplus held for the benefit of the owner. The tax authority retained only the amount of the taxes due with interest, Par. 93.

The *Longyear* case, *supra,* involved Michigan Laws of 1893, Act 206, Chap. 98, Par. 70 et seq. [3893]. That Statute also directed a sale of the property to enforce the judgment for the tax lien. The "surplus" sale was accomplished by a rather curious method, the smallest undivided fee interest which the purchaser would take was sold for the amount of the tax; this left the owner with the rest of the fee interest, but the County got only its taxes.

Likewise in the *Leigh* case, *supra*, involving the Laws of Nebraska 1875 at p. 107, a surplus sale was directed. The purchaser there bought the tax authority's lien which he could foreclose like a mortgage after a further sale, the surplus being "brought into Court for the use of the defendant."

Cooley, Taxation, Vol. 3, 4th Ed., states, "Par. 1436. Surplus Moneys. Various methods are adapted in different states to save, if possible, something to the owner when his land is sold."

Accordingly, the implication that *in rem* statutes for the enforcement of real estate tax liens are generally in line with New York's confiscatory method is flatly misleading, the fact to the contrary being that New York's statute appears unique on the point.

(2) There is direct authority that the City's *in rem* foreclosure statute and its action thereunder in confiscating Appellants' properties worth $52,000.00 to collect $887.00 of water charges violates the Fourteenth Amendment.

United States v. *Lawton*, 110 U. S. 146 (1884), seems direct authority for Appellants' case. In the *Lawton* case real estate was sold by the United States for non-payment of tax, amounting, with interest and costs, to $170.50. The United States bought it in for $1,100.00 although no money changed hands. The owner sued in the Court of Claims where he recovered $929.50, the surplus over the tax.

In sustaining the Court of Claims on appeal this Court said:

> "The present case differs from the *Taylor* case (*United States* v. *Taylor*, 104 U. S. 216) only in

this, that the land was in this case bought in by the Tax Commissioners for the United States, and no money was paid on the sale. It was so bought in for a sum which exceeded by $929.50 the tax, penalty, interest and costs. * * * The land in the present case having been 'struck off for,' and 'bid in' for, the United States at the sum of $1,100.00, we are of opinion that the surplus of that sum, beyond the $170.50 tax, penalty, interest and costs, must be regarded as being in the treasury of the United States, under the provisions of section 36 of the Act of 1861, for the use of the owner, in like manner as if it were the surplus of purchase money received by the United States from a third person on a sale of the land to such person for the non-payment of the tax. * * *

To withhold the surplus from the owner would be to violate the Fifth Amendment to the Constitution and to deprive him of his property without due process of law, or to take his property for public use without just compensation."

The opinion is all the more forceful in stating the owner's fundamental right to the surplus since it appears that the statute involved did not specifically provide for payment of the surplus to the owner.

The *Lawton* case is as good law today as it was when Mr. Justice Blatchford delivered his opinion. The prohibition which he placed on the Federal government against confiscation in collecting a real estate tax can and should be placed on the City of New York against confiscation of Appellants' properties in this case.

B

Appellee's suggestion that this appeal is moot seems without merit.

Appellants are entitled to prevail on the merits of this case if they can. Since they charge the original taking, without a surplus sale provided, was unlawful they are not restricted in recovering their properties to the partial relief afforded by Par. D 17-25.0 of the City Code, passed after this appeal was taken, and which provides heavy penalties in gross for the benefit of the City irrelevant to any tax due, and which obliges Appellants to pay the taxes for the period of the City's claimed ownership while the City retains all the rents for that period.

CONCLUSION

As to these appellants the City's *in rem* statute and its action thereunder violates the due process requirements of the Fourteenth Amendment.

Dated: November 7, 1956

Respectfully submitted,

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